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In the Supreme Court of the United States

OCTOBER TERM, 1944

No. 1246

ESTATE OF ROBERT MARSHALL, JAMES MARSHALL,
EXECUTOR, PETITIONER

v.

COMMISSIONER OF INTERNAL REVENUE

*ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES CIRCUIT COURT OF APPEALS FOR THE
SECOND CIRCUIT*

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the Tax Court (R. 38-45) is reported at 2 T. C. 1048. The opinion of the circuit court of appeals (R. 58-63) is reported at 147 F. 2d 75.

JURISDICTION

The judgment of the circuit court of appeals was entered on February 9, 1945 (R. 64-65). The petition for a writ of certiorari was filed on May 8, 1945. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Whether bequests made by decedent to three trusts established in his will are to be used by the trustees exclusively for charitable, scientific or edu-

cational purposes, so that the amount of the bequests is deductible from the value of decedent's gross estate under Section 812 (d) of the Internal Revenue Code as amended.

STATUTE INVOLVED

Internal Revenue Code:

SEC. 812. NET ESTATE.

For the purpose of the tax the value of the net estate shall be determined, in the case of a citizen or resident of the United States by deducting from the value of the gross estate—

* * * * *

(d) *Transfers for public, charitable, and religious uses.*—The amount of all bequests, legacies, devises, or transfers * * *¹ to or for the use of the United States, any State, Territory, any political subdivision thereof, or the District of Columbia, for exclusively public purposes, or to or for the use of any corporation organized and operated exclusively for religious, charitable, scientific, literary, or educational purposes, including the encouragement of art and the prevention of cruelty to children or animals, no part of the net earnings of which inures to the benefit of any private stockholder or individual, and no substantial part of the activities of which is carrying on propaganda, or otherwise attempting, to influence legislation, or to a trustee or trustees, * * * but only if

¹ The clause here omitted was added to this paragraph by Section 408 of the Revenue Act of 1942 and applies to estates of decedents who died after February 10, 1939, but is here irrelevant.

such contributions or gifts are to be used by such trustee or trustees, or by such fraternal society, order, or association, exclusively for religious, charitable, scientific, literary, or educational purposes, or for the prevention of cruelty to children or animals,² * * * (26 U. S. C., Sec. 812.)

STATEMENT

The issues involved arise wholly from the provisions of decedent's will. The facts as stated by the Tax Court (R. 39-42) are substantially as follows:

Decedent, a resident of the City and State of New York, died on November 11, 1939. By his will, after a specific bequest of \$3,000, he directed that his residuary estate be divided into four parts, and he bequeathed such parts to three separate trusts. There were five individual trustees named in each trust. The trusts were in perpetuity and the trustees were directed to invest and reinvest the principal and apply the income and such part of the principal as they might in their unlimited discretion deem necessary for the objects and purposes of the trust for which they were the trustees. (R. 39.)

The first trust, consisting of two parts, provided

² Section 409 (a) of the Revenue Act of 1942 inserted after the end of the passage quoted the following: "and no substantial part of the activities of such trustee or trustees, * * * is carrying on propaganda, or otherwise attempting, to influence legislation." That amendment became effective on October 21, 1942, and is inapplicable to the instant decedent's estate.

that the income and principal be used for the following purposes (R. 18, 39-40):

The education of the People of the United States of America to the necessity and desirability of the development and organization of unions of persons engaged in work or of unemployed persons and the promotion and advancement of an economic system in the United States based upon the theory of production for use and not for profit. The objects and purposes herein set forth shall be carried out through lawful means and only through lawful means, and for the purpose of carrying out such objects and purposes, I grant to the Trustees named full power and authority to employ and pay organizers, lecturers and writers and such other assistants and employees as they may deem necessary for properly fulfilling the objects and purposes of the trust as set forth by me herein, and to print, publish and distribute pamphlets, books, magazines and newspapers and generally to use any and all lawful means toward the furtherance of such objects and purposes, and they shall further have the authority to draft bills and acts, laws and other legislation and use all lawful means to have the same enacted into the law of the various States of the United States of America and by the Congress of the United States of America.

The second trust, consisting of one part, provided that the income and principal be used for the following purposes (R. 19, 40):

The safeguarding and advancement of the cause of civil liberties in the United States of

America and the various States and subdivisions thereof by all lawful means and actions, with full power and authority to the Trustees to print, publish and distribute pamphlets, books, magazines and newspapers and generally to use any and all lawful means to bring to the knowledge of the citizens of the United States of America the importance and necessity of preserving and safeguarding the cause of civil liberties. Said Trustees shall have the power to draft bills and acts, laws and other legislation and use all lawful means to have them enacted into the law of the various States and subdivisions thereof and by the Congress of the United States to the end that the civil liberties guaranteed to the citizens of the United States by their Federal constitution and by the various State constitutions be forever maintained, preserved and developed.

The third trust, consisting of one part, provided that the income and principal be used for the following purposes (R. 20, 41):

The preservation of the wilderness conditions in outdoor America, including, but not limited to, the preservation of areas embracing primitive conditions and transportation, vegetation and fauna, and to that end said Trustees shall have full power and authority to employ and pay lecturers and writers and such other assistants and employees as they may deem necessary for properly carrying out the purposes of the trust and to print, publish and distribute pamphlets, books, magazines and newspapers and generally to use any and all

lawful means to increase the knowledge of the citizens of the United States of America as to the importance and necessity of maintaining wilderness conditions in outdoor America for future generations, and said Trustees shall be empowered to use all lawful means in opposing statutes or regulations which will or may affect adversely the maintenance of wilderness conditions, and said Trustees shall have the power to draft such bills and acts, laws and other legislation and use all lawful means to have the same enacted by the various States of the United States of America and by the Congress of the United States as will tend to safeguard and preserve wilderness conditions in outdoor America.

The trustees of each trust were authorized and empowered to transfer and assign the whole or any part of the principal or income constituting the trust fund (R. 41)—

to a membership or other nonprofit making corporation or corporations organized under the laws of the State of New York, whose objects and purposes shall be in accord with or include the objects and purposes for which said trust is created.

The trustees were also authorized in their discretion (R. 41-42)—

to incorporate or cause to be incorporated under the General Laws of the State of New York or by special act of the legislature of the State of New York a corporation or corporations which shall have authority, among such other powers as may be conferred upon it, to

take and hold the property constituting the trust fund with respect to which such corporation shall have been organized, and to administer, invest and dispose of the same and to devote the principal thereof and the income therefrom to the objects and purposes specified in said Trust.

In the event of such incorporation, the testamentary trustees were to act as directors of the corporation, and any vacancy among the trustees was to be filled by a majority of the remaining trustees (R. 23, 42).

The Attorney General of the State of New York, as the statutory representative of the unknown beneficiaries of trusts for charitable, educational, religious, and benevolent purposes, has approved and consented to the administration of these trusts (R. 27, 42).

The Tax Court held that the bequests were not exclusively for charitable, scientific, literary or educational purposes within the meaning of Section 812 (d) of the Internal Revenue Code, and that the amount of the bequests was not deductible from the value of the gross estate (R. 42-45). The circuit court of appeals affirmed (R. 58-63).

ARGUMENT

The decision below rests upon two grounds: First, that bequests to trustees whose activities may consist predominantly in attempting to influence legislation are not "exclusively for * * * charitable, scientific, * * * or educational purposes", as they must be to permit a deduction under Section 812 (d)

of the Internal Revenue Code (*supra*, pp. 2-3); and second, that since no deduction would have been allowable had the bequests been made to a corporation directly, no deduction is allowable where the bequest is to trustees empowered to transfer their functions and the trust property to a corporation (R. 61-63).

With respect to the first ground, the petitioner asserts (Br. 13-14) that even though a substantial part of the activity of the trustees may be in attempting to influence legislation, the trusts are nevertheless "exclusively" charitable or educational. However, the courts have quite generally held that no deduction is allowable if substantial legislative activity is to be carried on, particularly where the legislative activity is itself an object of the trust or a means to an end which is political rather than charitable in character. *Slee v. Commissioner*, 42 F. 2d 184 (C. C. A. 2); *Leubuscher v. Commissioner*, 54 F. 2d 998 (C. C. A. 2); *Pennsylvania Co. for Insurance on Lives v. Helvering*, 66 F. 2d 284 (App. D. C.); *Vanderbilt v. Commissioner*, 93 F. 2d 360 (C. C. A. 1); *Faulkner v. Commissioner*, 112 F. 2d 987 (C. C. A. 1); *Cochran v. Commissioner*, 78 F. 2d 176 (C. C. A. 4). There is no conflict with this principle in the decisions in *Girard Trust Co. v. Commissioner*, 122 F. 2d 108 (C. C. A. 3), and *International Reform Fed. v. Dist. Unemployment Com. Bd.*, 131 F. 2d 337 (App. D. C.), certiorari denied, 317 U. S. 693. The question in the *Girard Trust Company* case was whether the gift was for a religious purpose (see *Sharpe's Estate v. Commissioner*, 148 F. 2d 179 (C. C.

A. 3)); and in the *Girard Trust Company* case as well as the *International Reform Federation* case, the legislative activities were mediate to causes which have long been regarded by some churches as religious; as least they were reforms on which the churches could agree—prohibition of liquor traffic, white slave traffic and narcotics, the defense of the Sabbath and purity, the suppression of gambling and political corruption, the substitution of conciliation for war. As the court observed in the *International Reform Federation* case, the end was not the advancement of the fortunes of a political party, but merely the accomplishment of national social improvement. Plainly, though these cases may have been erroneous in allowing the exemption despite the legislative activities that were involved, they can afford no basis for argument that the present trusts are exempt; for here, as both courts below held, the legislative activity contemplated by the testator was not mediate, ancillary or incidental to primary purposes exclusively charitable, religious or educational in character.

Moreover, the petitioner concedes (Br. 20) that if a substantial part of the activity to be carried on under the present bequests was to attempt to influence legislation, these bequests if made to a corporation would not be exempt. The decision below is plainly correct in holding that the power of the trustees to transfer the trust property and their functions to a corporation to carry out the testator's purposes defeats the exemption.

On either ground of the decision below, the case turns primarily upon the question whether the legislative activities to be carried on under the bequests are substantial. The courts below both held that they were, and that is the ultimate question which this Court is asked to review. If the Tax Court's determination of such a question is not controlling (cf. *Dobson v. Commissioner*, 320 U. S. 489, rehearing denied, 321 U. S. 231), yet it is clear that the question depends upon the terms of the particular will here involved, and has no general application.

Moreover, since in the view of the courts below the bequests contemplated substantial legislative activity and would not be deductible had they been made to a corporation, the present controversy turns solely upon a statutory distinction between bequests to trusts and bequests to corporations which has now been eliminated. In the Revenue Act of 1942 (fn. 2 *supra*), Congress added to the clause of Section 812 (d) which relates to trusts a provision similar to the clause previously in the same section, relating to corporations, and the statute now requires as to both that "no substantial part of the activities * * * is carrying on propaganda, or otherwise attempting, to influence legislation." The amendment gives no color to the taxpayer's argument that the present bequests, because they were made before 1942, are exempt (Br. 33-38), for the amendment is regarded as clarifying, and not changing, the rule applicable to the present case. I Paul, Federal Estate and Gift Taxation (1942), Sec. 12.17. The only significance

of the 1942 amendment here is to show that the rule has been settled for later years by legislation, and hence to diminish the importance of any controversy as to what the rule was before 1942.

CONCLUSION

The decision below is correct and presents no conflict or question of general importance. The petition for a writ of certiorari should be denied.

Respectfully submitted,

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